

PUBLICATION

IRS and Treasury Department Have Ruled: Same-Gender Spouses to be Treated Equally with Opposite-Gender Spouses for Tax Purposes

September 04, 2013

The IRS has issued much-anticipated guidance on the implication of the Supreme Court's decision in *Windsor*, declaring parts of the Defense of Marriage Act unconstitutional. In Revenue Ruling 2013-17 (Ruling), the IRS stated that, for purposes of federal tax laws, same-gender couples who have been legally married in a jurisdiction (domestic or foreign) that allows same-gender marriage will be treated as married for all purposes under federal tax laws in all states, regardless of the couple's state of residence or domicile. In effect, the law of the state of celebration of a marriage controls for federal tax purposes. This treatment of same-gender spouses does not apply to persons who are in registered domestic partnerships or civil unions or are otherwise in a relationship which does not constitute a marriage under the law of the jurisdiction in which the relationship arose.

The Ruling applies only for federal tax purposes and not for other federal, state or local law purposes. Other similar regulatory guidance, or perhaps even statutory revisions, would be required to produce the same or a similar effect for these other purposes.

Except for some very limited allowances for revising returns for open tax years, the IRS's Ruling will be applied prospectively as of **September 16, 2013**. In the Ruling and related Q&As, the IRS states that it will be providing additional guidance, particularly with respect to employer-sponsored retirement plans. Thus, the possibility remains that there could be some retroactive application of the treatment of same-gender spouses under some tax-qualified retirement plans.

This Ruling has significant impact on a number of employee benefit and other federal tax issues for both employers and individuals and employers. Below, we address some of these issues impacting employer-sponsored benefit plans:

Health Plan Benefits

1. Tax Treatment of Employer and Employee Contributions for Coverage of Same-Gender Spouses. Historically, employees could not pay for health care coverage for their same-gender spouses on a pre-tax basis. In addition, employers were required to impute income to the employees when the cost of coverage was subsidized by the employer for the employees' same-gender spouses unless the spouse separately qualified as the employee's tax dependent. Under the Ruling, the federal tax treatment of same-gender spouses will be the same as opposite-gender spouses, allowing for pre-tax premium payments and no requirement to impute income for employer-paid coverage.

This rule becomes effective September 16, 2013. Employers and individuals may obtain refunds for federal income, FICA and FUTA taxes on the value of employer-subsidized coverage for same-gender spouses for open tax years. The rules on applying for refunds can be complicated and we advise you to consult your legal advisor about your particular circumstances.

2. **Special Enrollment Rights.** Employer-sponsored group health plans are required to allow mid-year enrollments upon certain life events such as marriage, birth and adoption. Under the Ruling, marriage to a same-gender spouse will trigger these special enrollment rights.

3. **COBRA Continuation Coverage.** COBRA requires employers with 20 or more full-time employees to allow covered individuals the right to continue, as their own expense, health coverage for a period of time following a certain qualifying event, such as termination of employment, death and divorce. Same-gender spouses will now be protected with a separate COBRA right, in the same manner as opposite-gender spouses have been protected.

4. **Flexible Spending Accounts, Health Savings Accounts and Health Reimbursement Accounts.** Federal tax laws will now permit the reimbursement of expenses of a same-gender spouse or the spouse's children under any of these plans.

5. **Dependent Care Reimbursement Accounts (DCRA).** These accounts, which allow for an employee to pay for dependent care on a pre-tax basis, will now include a same-gender spouse's children.

Retirement Plans

1. **Rights of Spouses over Form of Distribution.** Applicable law requires certain types of retirement plans to provide for Qualified Joint and Survivor Annuities and Qualified Preretirement Survivor Annuities in which the employee's spouse is entitled to certain rights with respect to the payment of benefits. In general terms, an employee cannot elect a form of payment other than an annuity which provides a contingent annuity to the surviving spouse, unless the spouse properly waives the right.

While additional guidance is forthcoming, it is clear that from September 16, 2013 forward, same-gender spouses will have entitlement to these same rights. Thus, if an employee is about to enter pay-status under a "pension" plan (a category of retirement plan) subject to these rules, the employer should verify if there is a same-gender spouse and confirm compliance with these rules for that spouse. Such verification can be complex in certain circumstances and should not be attempted without advice of counsel. The treatment of distributions remains an open issue that should be addressed by future guidance prior to September 16, 2013.

2. **Spousal Consent Rights.** Distributions, including loans and hardship withdrawals, from most pension plans cannot be made to married participants absent consent by the spouse. The IRS's Ruling has extended this consent requirement to same-gender spouses.

3. **Payment of Death Benefits.** Absent a proper waiver, certain retirement plans must provide that death benefits be paid to the surviving spouse. Same-gender spouses are now entitled to the same protections. Accordingly, employers would be wise to consult with legal counsel about requiring some or all employees to execute new beneficiary designation forms and, if a non-spouse is elected as beneficiary, having the employee affirmatively indicate that the employee is not married. As noted above, there are open issues with any retroactive application of these rules and whether same-gender spouses for whom death benefits have been paid to non-spouse beneficiaries were appropriate.

4. **Spousal Rollover Rights.** Both spouses and non-spouses who are beneficiaries of a retirement plan participant's account balance may roll over a distribution from the retirement plan to an IRA; however, only spouses can roll over the death benefit to another qualified employer plan. Same-gender spouses will now be allowed to roll over an inherited plan benefit to their employers' qualified plans.

5. Age 70½ Required Minimum Distributions. Surviving spouses may have special rights to defer distribution of death proceeds from a retirement plan. Under the IRS's Ruling, these rights also apply to same-gender spouses.

6. Qualified Domestic Relations Orders (QDROs). Under an exception to ERISA's anti-alienation rules, a participant's retirement plan benefits can be required to be paid to a former spouse incident to a court-ordered QDRO. This same requirement can possibly now be claimed to apply in the context of same-gender spouses; although state-specific statutes may present obstacles to obtaining or enforcing a QDRO.

Welfare Benefit Plans

In general, there are no special protections for spouses under other benefit plans such as life, disability and AD&D. These benefits are typically provided through policies of insurance which are subject to state regulation. Accordingly, the IRS's Ruling may have no significant impact on these benefit plans. However, the specific language of the relevant plan may result in same-gender spousal rights, in light of the Ruling.

The above is not an exhaustive list of all issues pertaining to employee benefits that may be impacted by the Supreme Court's ground-breaking decision and the IRS's Ruling, but is intended to identify some of the more commonly-occurring issues. The Ruling also affects aspects of individual and employer taxation.

Summary

This historic Ruling will have a significant impact on employers and individuals. While many questions remain, particularly with respect to employee benefits and any retroactive effect, what is clear is that effective September 16, 2013, same-gender spouses legally married under the law of any jurisdiction, regardless of the state of residence, will be treated as married for federal tax purposes. Many individual taxpayers will seek to amend open-year returns and employers may be faced with the choice of whether to do so as well. Again, we encourage employers to be proactive in seeking legal counsel regarding the impact of the IRS's Ruling upon their particular facts and circumstances. Where the rules are now relatively clear, employers should revise their plans, policies, practices and procedures.

Should you wish to discuss the impact of the IRS's Ruling on your particular facts and circumstances, please do not hesitate to contact any one of the attorneys within the Firm's Tax Group.